Neutral Citation Number: [2002] EWHC 258 Admin

IN THE HIGH COURT OF JUSTICE NO: CO/4192/01
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2

Friday, 18th January 2002

B e f o r e:

LORD JUSTICE AULD

and

MR JUSTICE GAGE

- - - - - - -

THE ENVIRONMENT AGENCY

-v-

ME FOLEY (CONTRACTORS) LTD

- - - - - -

Computer-Aided Transcript of the stenograph notes of
Smith Bernal Reporting Limited,
180 Fleet Street, London EC4A 2HG
Telephone No: 020 7421 4040 Fax No: 020 7404 1424
(Official Shorthand Writers to the Court)

- - - - - -

MR PETER BLAIR (instructed by Environment Agency, 1st Floor, Brunel House, Fitzalan Road, Cardiff) appeared on behalf of the Claimant
THE DEFENDANT DID NOT APPEAR AND WAS NOT REPRESENTED

- - - - - - -

J U D G M E N T
(As approved by the Court)

- - - - - - -

1. LORD JUSTICE AULD: The Environment Agency appeals by way of case stated from decisions of the Cardiff Magistrates on 1st August 2001, acquitting the two respondents of offences contrary to section 33(1)(a) of the Environmental Protection Act 1990. That provision makes it an offence to:

> "deposit ... or knowingly cause or ... permit controlled waste to be deposited in or on any land unless a waste management licence authorising the deposit is in force and the deposit is in accordance with the licence."

2. "Controlled waste" is defined in section 75(4) of the Act as "household, industrial, and commercial waste, or any such waste". The excepting words following the word "unless" in that provision allows, where the first constituent is present, namely the requisite licence, but the deposit is not in accordance with it, an exception to an exception.

3. It is also an offence under this provision to deposit controlled waste of a certain type, namely "special waste", as defined in the Control of Pollution Special Waste Regulations 1980. Soils contaminated with more than 10 per cent calcium hydroxide are so defined. This form of the offence also involves an exception to an exception.

4. On the facts of this case, the exception to the exception came into play in different ways, according to which of two sites, the subjects of the charges, the controlled waste was transported: namely, the Cardiff Waste Disposal Landfill Site, or the second respondent's, Sea Wall Reinforcement Works. As to the Cardiff Waste Disposal Landfill Site, there was a waste management licence authorising the deposit of controlled waste but specifically excluding special waste without the prior written approval of the Waste Disposal Authority. As to the Sea Wall Reinforcements Works, it was exempt from waste management licensing under the Waste Management Licensing Regulations 1994, regulation 17, save in respect of special waste.

5. The first respondent transported controlled waste to both sites. As a result of the statutory and regulatory scheme that I have summarised, it was only permitted to deliver to the Cardiff Landfill Site soil contaminated with more than 10 per cent calcium hydroxide if it had prior written approval of the Waste Disposal Authority. As to the Sea Wall Reinforcement Works, it was not permitted to deliver such contaminated soil to it at all. This was how the relevant charges against the first respondent reflected that statutory position in relation to both sites: that the first respondent:

> "...did knowingly cause controlled waste, namely soils contaminated with more than 10 per cent calcium hydroxide to be deposited on land...in respect of which a waste management licence authorising such deposit was not in force."

6. The second respondent accepted deliveries of controlled waste at its Sea Wall Reinforcement Works. As a result of the same statutory and regulatory scheme, it was not permitted to deposit soil contaminated with more than 10 per cent calcium hydroxide at that site at all. The relevant charges against the second respondent reflected this statutory position in relation to that site in almost identical terms to those of the charges against the first respondent, namely, that the second respondent:

> "...did knowingly permit controlled waste, namely sub soils contaminated with more than 10 per cent calcium hydroxide to be deposited on land...in respect of which a waste management licence authorising such deposit was not in force."

7. The only material difference between the two forms of charge was in respect of the factual difference arising from the second defendant's ownership of the Sea Wall Reinforcement Works site in the use of the word “permit” instead of “cause”.

8. In trying to understand the relationship between section 33(1)(a) and the related regulatory provisions to see what in plain terms the offences alleged are, I am driven to a different formulation of the questions for the opinion of this court from those posed by the magistrates. The questions posed by the magistrates were:

> “(i) Whether, in respect of a charge brought under section 33(1)(a) of the Environmental Protection Act 1990, it having been accepted or proved that a deposit on land of controlled waste has been caused and/or permitted by the accused, the burden of proving that there was no waste management licence (or exemption under the Waste Management Licensing Regulations 1994) in force authorising the deposit of such controlled waste or that the deposit was not in accordance with the licence (or exemption) in that the controlled waste was special waste lies with the prosecutor.
>
> (ii) Whether in the circumstances of the wording of section 33(1)(a) of the Environmental Protection Act 1990 and the provisions of section 101 of the Magistrates' Courts Act 1980, the burden of proving that there was a waste management licence (or exemption under the Waste Management Licensing Regulations 1994) in force authorising the deposit of such controlled waste and that the deposit was in accordance with the licence (or exemption) in that the controlled waste was not special waste lies on the accused.”

9. In my view, the questions for decision in the case of the first respondent at the Cardiff Landfill Site is: (i) whether it was for the prosecution to prove that it, the first respondent, had delivered contaminated soil, and (ii) that it had done so without prior written approval, or whether it was for the first respondent to prove on a balance of probabilities that the soil was not contaminated, or that, if it was, it had prior written approval.

10. The question in the case of the first respondent when delivering to the Sea Wall Reinforcement Works site, and for the second respondent when accepting deliveries to that site is, in my view, whether it was for the prosecution to prove that the first respondent had delivered and the second respondent had accepted contaminated soil, thus taking them outside the exemption, or for them to prove that it was not contaminated soil, thus preserving the exemption.

11. The magistrates noted in paragraph 7(f) and (g) of the case that the issue in each case was not whether there was an appropriate management licence or exemption for the deposit of the contaminated soil - special waste - but whether the respondents had deposited contaminated waste at all. They recognised that had the former been the issue, the burden of proving the existence of such a licence or exemption would have been on the respondents. But, as it was the latter issue in play, and I quote from paragraphs 7(g) and (h) of the case:

> “(g)...it was the prosecution's burden to prove not only controlled waste of any type was transported but that as stated in the information that the controlled waste was a specific type, in this case was contaminated with more than 10% calcium hydroxide on a weight for weight basis.
>
> (h) In reaching this decision the court considered that it must be the case that the prosecution must prove what type of controlled waste was transported or

> deposited, otherwise if a defendant produced any type of waste management licence, that did not necessarily allow for special waste, but allowed for a different type of controlled waste, it could be argued by the defence that they had satisfied the court that a 'waste management licence' was in force that allowed for the deposit of 'controlled waste'."

12. The magistrates were thus of the view that in the case of both respondents it was for the prosecution to prove that the controlled waste included contaminated soil and that, in the case of the first respondent when delivering to the Cardiff Landfill Site, it had done so without prior written approval. Accordingly, because on the evidence before them, the magistrates were of the view that the prosecution had not proved that the controlled waste in question was contaminated with more than 10 per cent calcium hydroxide, they acquitted both respondents of the charges.

13. Mr Peter Blair, on behalf of the appellant, the Environment Agency, challenged the magistrates' reasoning and decision. He submitted that once the appellant had proved that the respondents had knowingly caused or permitted the deposit of controlled waste on any land, the burden shifted to them to prove on a balance of probabilities that there was a waste management licence authorising the deposit, and that the deposit was in accordance with the licence, or that it was exempt from any licensing requirements at all. Put another way, he maintained that it was for the respondents to prove that the controlled waste in question was not contaminated as alleged. He relied on the general rule, of which section 101 of the Magistrates' Court Act 1980 is a statutory example, that the prosecution does not normally have to prove a negative. That section reads:

> "Where the defendant to an information or complaint relies for his defence on any exception, exemption, proviso, excuse or qualification, whether or not it accompanies the description of the offence or matter of complaint in the enactment creating the offence or on which the complaint is founded, the burden of proving the exception, exemption, proviso, excuse or qualification shall be on him; and this notwithstanding that the information or complaint contains an allegation negativing the exception, exemption, proviso, excuse or qualification."

14. The provision in those final words thus makes specific allowance for an exception to an exception.

15. Mr Blair submitted that the statutory regime here is very simple. Section 33 forbids a deposit unless it comes within the licensing regime. Whether it does so, he submitted, is essentially the responsibility of those who are engaged in the transport management and deposit of waste. He referred to the statutory and regulatory provisions for documentation of the handling of waste at its various stages, which he described as an audit trail. This, as I understand his argument, is that it is an aid to potential defendants under this legislation in identifying the nature of the waste they are handling if and when they are required to do so.

16. However, Mr Blair acknowledged that there is no authoritative case law on the point as it applies to these provisions. The matter was touched on inconclusively by the Court of Appeal when considering section 3(1) of the Control of Pollution Act 1974, the similarly constructed predecessor of section 33(1)(a) of the 1990 Act, in Ashcroft v Cambro Waste Products Limited [1981] 3 All ER 699, at p. 702F to G.

17. Focusing on the application of section 33(1)(a) to the facts of this case, Mr Blair submitted that there is nothing in its wording to require the prosecution to prove any more than that the

waste in question was controlled waste. He highlighted the critical words, as he saw them:

> "...a person shall not-
>
> (a)...knowingly cause or knowingly permit controlled waste to be deposited in or on any land."

18. He continued by arguing that the prosecution did not shoulder the burden of proving it was special waste in the form of contaminated soil simply because it had so asserted in the charges set out in the summonses. He referred in this connection to the reasoning of this court in R v Edwards [1974] 2 All ER 1085, which concerned the prohibition on the sale of intoxicating liquor without a licence. Lawton LJ, giving the judgment of the court, analysed the history of the law governing the burden of proof in relation to provisos or exceptions and concluded in two passages at 1095B and E:

> "...the common law... has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged...It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely on the exception...
>
> Two consequences follow from the view we have taken as to the evolution and nature of this exception. First, as it comes into operation on an enactment being construed in a particular way, there is no need for the prosecution to prove a prima facie case of lack of excuse, qualification or the like; and secondly, what shifts is the onus; it is for the defendant to prove that he was entitled to do the prohibited act. What rests on him is the legal or, as it is sometimes called, the persuasive burden of proof. It is not the evidential burden."

19. The only other authority touching on this provision to which Mr Blair referred us, after exhaustive research of the authorities, was an unreported decision of this court in The Environment Agency v Short (13th July 1998). But the court in that case did not consider the matter in any depth, it not having been argued fully before it.

20. Mr Blair concluded his argument by submitting that the position as to the reversal of burden of proof in provisos and exception cases has not been affected by the advent of human rights to our law, citing R v Lambert [2001] UKHL 37. And, he added, there are strong policy justifications for its maintenance. In that respect, the context of policy, he drew on a Department of Environment Circular 6/96 entitled "Special Waste Regulations" Annex B, paragraph 12. It begins:

> "Who should assess the waste:
>
> The duty of care Code of Practice is clear that waste producers are normally best placed to know what their waste is, to describe it and choose the disposal or treatment method, if necessary with expert help or advice available commercially. The Special Waste Regulations require the consignor to ensure

> that the special waste consignment note is properly completed. It follows that the assessment needed to determine whether waste is special, to describe it properly, to meet the Duty of Care, is for the consignor - generally the producer of the waste. Any subsequent holder of the waste should reassess the waste if there is reason to believe that the consignment note does not properly describe it, or if the arrangements for its management are in doubt."

21. The respondents have not been represented in court on this appeal, but a case on behalf of the second respondent has been presented in written skeleton argument form prepared by counsel, Mr John Bates. He submitted that the key to the matter is set out in the magistrates' case in the passage that I have read from paragraph 7(g), namely that it was for the prosecution to prove not only that controlled waste of any type was transported or deposited, but that it was special waste in that it was contaminated as stated in the charges.

22. He maintained that on a proper construction of section 33(1)(a) the assertion in the charges that the respondents were depositing contaminated soil was exactly what the prosecution was required to prove to make out the charge. It did not, he submitted, turn on the application of the proviso. Proof of the specific type of the waste alleged to have been deposited unlawfully was an essential ingredient of the offence. He drew on a useful and simple analogy in the task of the court when considering a charge of possession of a controlled drug. In R v Hunt [1987] 1 AC 353 Lord Griffiths said at 376C:

> "The essence of the offence is having in one's possession a prohibited substance. In order to establish guilt the prosecution must therefore prove that the prohibited substance is in the possession of the defendant. As it is an offence to have morphine in one form but not an offence to have morphine in another form the prosecution must prove that the morphine is in the prohibited form for otherwise no offence is established."

23. This case is different from Hunt in that any deposit of controlled waste is unlawful unless it is licensed or exempt from licensing. However, it is clear that Lord Griffiths considered that it was for the prosecution to prove: (i) that there was possession of a prohibited substance, and (ii) that the substance contained morphine before going on to prove that it was not in a permitted form.

24. Mr Blair submitted that the case of Hunt differs from this in that there "the whole linguistic construction" of the statute did not clearly indicate where the burden of proof lay. Whereas here, he maintained, the construction of section 33 does clearly indicate that it is for the defendant to prove the facts following the word "unless" in the provision. However, in developing that submission, he acknowledged that, statute by statute, there is a line to be drawn in these matters. The question that arises in this case, on a proper construction of section 33 of the 1990 Act, is on which side of the line does this one fall?

25. Mr Bates' arguments, and his reliance on the passage in Lord Griffiths' speech to which I have referred, reassuringly fit with my attempt at the beginning of this judgment to set out in simple terms the ingredients of the alleged offences, leading me to restate the questions that, on the issues before the magistrates, I consider this court should answer.

26. Mr Bates' submissions are also of a piece with the core of the magistrates' reasoning in the passage from paragraphs 7(g) and (h) in their case that I have set out. They too were concerned to identify the ingredients of the alleged offences in simple terms and, in considering where the burden of proof lay, to focus on the issue raised in the case.

27. In my view, following the structure of the questions for the court as I see them, I would answer as follows.

28. In the case of the first respondent, when delivering to the Cardiff Landfill Site, it was for the prosecution to prove that it had delivered special waste, namely contaminated soil, but not that it had done so without prior written approval. The latter, negative, averment was of a matter peculiary within the first respondent's knowledge and it was for it to establish the requisite approval on a balance of probabilities if it sought to challenge the prosecution case in that repsect.

29. In the case of the first respondent, when delivering to the Sea Wall Reinforcement Works site, and for the second respondent when accepting deliveries to that site, it was for the prosecution to prove that the waste respectively delivered and accepted contained special waste, namely contaminated soil, thus taking it outside the exemption.

30. It will be noted that I have reached this conclusion without further reference to section 101 of the Magistrates' Courts Act 1980. That is because, as the magistrates rightly concluded, this was not a case which, on the structure of section 33(1)(a), or the issue in play, was truly concerned with an exception or proviso. I agree with Mr Bates' contentions that a court, before resorting to section 101 in a section 33(1) case, should consider the particular exemption in play. There are a number of them in schedule 3 to the Waste Management Licensing Regulations 1994, the regulations detailing the circumstances in which the exemptions do not apply; see, for example, regulations 17(3) and (4). It follows from what I have said that courts should consider carefully the issues of fact they have to decide before proceeding to consider the application and effect of section 101 of the 1980 Act to any particular statutory offence. There should thus be a case-specific approach rather than the adoption of a blanket section 101 approach to complex offence-creating statutory provisions involving exceptions and, as here, exceptions to exceptions.

31. This point was well made by Lord Griffiths in a further passage from his speech in Hunt at 374F to H, referring to the House of Lords decision in Nimmo v Alexander Cowan & Sons Ltd [1968] AC 107:

> "Their Lordships were in agreement that if the linguistic construction of the statute did not clearly indicate upon whom the burden should lie the court should look to other considerations to determine the intention of Parliament such as the mischief at which the Act was aimed and practical considerations affecting the burden of proof and, in particular, the ease or difficulty that the respective parties would encounter in discharging the burden. I regard this last consideration as one of great importance for surely Parliament can never lightly be taken to have intended to impose an onerous duty on a defendant to prove his innocence in a criminal case and a court should be very slow to draw any such inference from the language of a statute. When all the cases are analysed, those in which the court have held that the burden lies on the defendant are cases in which the burden can be easily discharged."

32. See also Lord Griffiths' observations in Hunt at 374H to 375E. The Divisional Court, consisting of Lord Bingham, then Lord Chief Justice, and Buxton LJ, applied that reasoning in Murfitts Transport Ltd v Department of Transport [1997] EWHC (Admin) 665, at paragraphs 17 to 23, a case concerning section 97 of the Transport Act 1968.

33. I have not forgotten the policy argument of Mr Blair and Lord Griffiths' caution in the passage from his speech in Hunt on the need to determine the intention of Parliament and to

have regard to ease or difficulty either way in the discharge of proof.

34. The Department of Environment Circular, to which Mr Blair referred was, as its terms made clear, concerned with waste producers, who of course are best placed to know of what their waste consists. But section 33 is concerned with more than producers. It is concerned with those who deliver to waste sites and those who manage and receive deliveries at such sites. The position is different for an innocent transporter or receiver of waste for whom there may be obvious difficulties in establishing, lorry load by lorry load, whether consignments contain special waste. The same may be true in many cases for major producers of waste, which may be variable in nature, whether any particular load, assuming that it can be identified at its place of arrival, was or was not special waste.

35. To the extent that defendants have an audit trail of documents to which they can turn, and which might be capable of assisting their case evidentially, as business records, the audit trail is or should also be available to the prosecution. If there is any suggestion that documents are false, that is clearly a matter that the prosecution would have to prove in any event. If there are no documents, for whatever reason, defendants would have to explain and/or justify that under the relevant provisions for keeping records. But their absence, culpable or otherwise, could not be a basis, legally or as a matter of policy, for not requiring the prosecution to prove that those charged under section 33 have deposited controlled waste.

36. Another pointer against Mr Blair's policy argument is that section 33(7) provides that defendants charged with a section 33(1) offence have a defence where, inter alia, they prove on a balance of probabilities that they took all reasonable precautions and exercised all due diligence to avoid the commission of the offence. It seems to me that, on an issue whether a defendant had deposited controlled waste of a type and in circumstances which were prohibited (other than by the absence of a licence or an exemption) it is unlikely that Parliament would have imposed the onus on the defendant of disproving it was prohibited waste, whilst at the same time providing him with the defence of reasonable precautions and due diligence under section 33(7).

37. Accordingly, I would answer the questions as I have restated them and, as I have indicated, I would dismiss the appeal.

MR JUSTICE GAGE: I agree. Like my Lord I have gained much assistance from the decision of the House of Lords in R v Hunt [1987] 1 AC 352. In this case, in my judgment, where a waste management licence is held, the prosecution cannot prove that an offence has been committed simply by proving that controlled waste has been deposited; because of the admitted existence of the licence, that is not an offence. In those circumstances, it seems to me, that the offence is only committed when the prosecution prove that the waste deposited was special waste.

Similarly, in the case of exempt waste, provided for by regulation 17 of the Waste Management Licensing Regulations 1994, the offence is only committed when the waste deposit is proved by the prosecution to be special waste. That is a fact which the prosecution, in my judgment, must prove.

Accordingly, I would answer the questions, as revised by my Lord, in precisely the same terms.

LORD JUSTICE AULD: Accordingly, the appeal is dismissed. We are very grateful to you, Mr Blair, for your assistance and for your considerable researches.

MR BLAIR: I am grateful.